38

(2)

No. 09-130

Supreme Court, U.S.
FILED
AUG 28 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GAILE K. OWENS,

Petitioner,

v.

JEWEL STEELE, Warden,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN IN SUPPORT OF PETITIONER

ELLIOT H. SCHERKER
JULISSA RODRIGUEZ
KERRI L. MCNULTY
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, FL 33131
Telephone: (305) 579-0500
Facsimile: (305) 579-0717

KAREN M. GOTTLIEB
Counsel of Record
Post Office Box 1388
Coconut Grove, FL 33233-1388
Telephone: (305) 648-3172
Facsimile: (305) 648-0465

PETER R. GOLDBERGER
50 Rittenhouse Place
Ardmore, PA 19003
Telephone: (610) 649-8200
Facsimile: (610) 649-8362

Attorneys for Amicus Curiae

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	3
The Sixth Circuit's Immateriality Finding Cannot Be Reconciled With The Record Of Battering And Its Effects Manifested Throughout The Judicial Proceedings In This Case And Ignores The Significance Of The Suppressed Evidence In The Context Of Domestic Violence.	3
A. The Pre-trial Record Reflects That Gaile Owens Was The Victim Of Domestic Violence.	5
B. Battering, Its Effects, And The Materiality Of The Suppressed Evidence Of Infidelity.	8
C. Battering And Its Effects: The Rationalization And Denial Of Violence And The Vital Role Of Independent Corroboration.	13
CONCLUSION	21

TABLE OF CITED AUTHORITIES

Page

Cases:

Brady v. Maryland,
373 U.S. 83 (1963) 15, 18, 21

Cone v. Bell,
__ U.S. __, 129 S. Ct. 1769 (2009) 21

DePetris v. Kuykendall,
239 F.3d 1057 (9th Cir. 2001) 17

Hernandez v. Ashcroft,
345 F.3d 824 (9th Cir. 2003) 16

Ibn-Tamas v. United States,
407 A.2d 626 (D.C. 1979) 6, 9, 15

Kyles v. Whitley,
514 U.S. 419 (1995) 8, 21

Owens v. Guida,
549 F.3d 399 (6th Cir. 2008) 8

State v. Kelly,
478 A.2d 364 (N.J. 1984) 9, 10

United States v. Bagley,
473 U.S. 667 (1985) 18

United States v. Johnson,
956 F.2d 894 (9th Cir. 1992) 10

Cited Authorities

Page

Statutes/Rules:

TENN. CODE ANN. § 39-2-203(h) (1982) 5

Other Authorities:

Angela Browne, *The Victim's Experience: Pathways to Disclosure*, 28 PSYCHOTHERAPY 150 (1991) 13, 14, 19

Audrey Rogers, *Prosecutorial Use of Expert Testimony in Domestic Violence Cases: From Recantation to Refusal to Testify*, 8 COLUM. J. GENDER & L. 67 (1998) 4

Charles Patrick Ewing & Moss Aubrey, *Battered Woman and Public Opinion: Some Realities about the Myths*, 2 J. FAM. VIOLENCE 257 (1987) 16

Developments in the Law: Legal Responses to Domestic Violence, 106 HARV. L. REV 1498 (1993) 16

Judith E. Koons, *Gunsmoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly Legal Doctrines*, 14 J.L. & POL'Y 617 (2006) 10, 12

Cited Authorities

Page

Kathleen J. Ferraro & John M. Johnson, *How Women Experience Battering: The Process of Victimization*, 30 SOC. PROBS. 325 (1983) .. 11, 13, 14

Leslie A. Sackett & Daniel G. Saunders, *The Impact of Different Forms of Psychological Abuse on Battered Women*, 14 VIOLENCE AND VICTIMS 1 (1999) 12

Liane V. Davis, *Beliefs of Service Providers about Abused Women and Abusing Men*, SOC. WORK, May-June 1984 17

Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107 (2009) 11, 12

Marsha E. Wolf et al., *Barriers to Seeking Police Help for Intimate Partner Violence*, 18 J. FAM. VIOLENCE 121 (2003) 19

Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Towards a New Conceptualization*, 52 SEX ROLES 743 (2005) 11

MICHAEL P. JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE (2008) 7, 12

Cited Authorities

Page

RAQUEL KENNEDY BERGEN, WIFE RAPE: UNDERSTANDING THE RESPONSE OF SURVIVORS AND SERVICE PROVIDERS (1996) 13

Richard J. Gelles, *Power, Sex, and Violence: The Case of Marital Rape*, 26 THE FAMILY COORDINATOR 339 (1977) 13-14

Rita Weingourt, *Wife Rape: Barriers to Identification and Treatment*, XXXIX AM. J. PSYCHOTHERAPY 187 (1985) 15

State v. Kelly: Amicus Briefs, 9 WOMEN'S RTS. L. REP. 245 (1986) 9, 10

Sue Osthoff & Holly Maguigan, *Explaining Without Pathologizing: Testimony on Battering and Its Effects*, *in* CURRENT CONTROVERSIES ON FAMILY VIOLENCE 225 (Donileen R. Loseke et al. eds., 2005) 4

INTEREST OF AMICUS CURIAE[1]

The National Clearinghouse for the Defense of Battered Women (NCDBW) works to ensure justice for battered women charged with crimes, where a history of abuse is relevant to the woman's legal claim or defense. The organization is committed to ensuring that battered women charged with crimes, like all defendants, receive the full benefit of all rights and protections designed to ensure fair trials, accurate verdicts, and appropriate sentences. To this end, NCDBW seeks to educate those involved in the criminal justice system about battering and its effects, so that the legal decisions affecting battered-women defendants are not based on misconceptions. NCDBW also advocates for reforms in existing legal rules and practices, where needed to ensure fairness for all accused persons, including battered women.

One misconception about battered women is that, if abuse is severe or even happened at all, there will be independent tangible corroboration, such as medical or hospital records or police reports and restraining orders. Another misconception is that all abuse is physical violence. But extensive research has established that emotional, psychological, and sexual abuse is often the

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission. Petitioner and respondent have consented to the filing of this *amicus brief*; their letters of consent have been filed with the Clerk of this Court.

most prevalent component of the power and control dynamic that underlies spousal battering, and that a victim's disclosure of such abuse, particularly sexual abuse by a spouse, is both difficult and often avoided at all costs. At the same time, it is a simple reality that a battered woman is more likely to be believed when there is independent tangible corroboration and less likely to be credited without such evidence.

Based on our experience, NCDBW knows that the majority opinion can only serve to perpetuate anachronistic misconceptions about battered women, including that battering, if true, should readily be subject to independent corroboration, that battering is primarily manifested as physical violence, and that a woman should readily be able to testify about her experience of abuse and expect to be believed. The majority, while discounting Gaile Owens' horrific abuse because that abuse was deemed to be inadequately corroborated by independent evidence, also discounts the significance of independent tangible corroboration of one aspect of that abuse – her husband's extramarital affair – the existence of which the prosecutor affirmatively denied.

The majority's decision thus both perpetuates the misconception that, if a woman has been battered, there will be corroboration, and, at the same time, holds immaterial the independent tangible corroboration of Ms. Owens' abuse that the prosecution suppressed at trial. In so doing, the majority deviated from all prior decisions construing the *Bagley-Kyles* "materiality" rule, and disregarded the significance of independent corroboration for every criminal defendant, whose credibility is always called into question by the presumption of a motive to lie.

STATEMENT OF THE CASE

NCDBW adopts petitioner's Statement of the Case.

REASONS FOR GRANTING THE PETITION

THE SIXTH CIRCUIT'S IMMATERIALITY FINDING CANNOT BE RECONCILED WITH THE RECORD OF BATTERING AND ITS EFFECTS MANIFESTED THROUGHOUT THE JUDICIAL PROCEEDINGS IN THIS CASE AND IGNORES THE SIGNIFICANCE OF THE SUPPRESSED EVIDENCE IN THE CONTEXT OF DOMESTIC VIOLENCE.

"This is not a close case." Pet. App. 55 (Merritt, J., dissenting). Judge Merritt's conclusion would be indisputable even if Ms. Owens had not been a victim of horrendous domestic abuse. But his conclusion's validity is emphatically underscored when viewed through the lens of domestic violence and its consequences. This brief will thus address battering and its effects, in the context of Ms. Owens' trial, but also with an examination of a range of issues relevant to a battered woman's legal defense, as elucidated throughout the judicial proceedings in this case.[2]

---

2. NCDBW uses the phrase "battering and its effects" rather than "battered woman's syndrome," because the latter term inadequately encompasses battering's broad range of characteristics, as well as individual reactions to battering, and evokes stereotypes of battered women as maladjusted or disturbed. The majority of cases and commentators, particularly at the time of Ms. Owens' trial, use the terminology of "battered

(Cont'd)

Ms. Owens' trial was not only marred by the prosecution's deliberate failure to disclose the police report and the sexually explicit letters between Mr. Owens and his paramour – the critical suppressed evidence – but also by the utterly pernicious effect of that non-disclosure, which tainted the entire pre-trial and trial proceedings. Even without adverting to the multitude of issues arising from battering and its effects, it is at once obvious that Ms. Owens' trial would have been remarkably different had the prosecution disclosed the evidence.

The prosecution – having wrongly, if not deceitfully – assured Ms. Owens and her counsel that "every single scintilla of evidence" (CA6 J.A. 111) in its possession had been divulged and that no letters had been withheld, presented its case to the jury as the murder of an "innocent man" (CA6 J.A. 165) by a "desperate woman" — who was desperate "not because of anyone else's actions, but because of her own actions." CA6 J.A. 151. The sole motive for the killing, according to the prosecutor, was to "collect the insurance money. It's just that simple" because Ms. Owens was "just . . . plain no-good." CA6 J.A. 152; Tr. 1941. At sentencing, the prosecutor quipped, "Well, sure she had a problem . . .

(Cont'd)

woman's syndrome" and this brief will accordingly use both phrases. *See* Audrey Rogers, *Prosecutorial Use of Expert Testimony in Domestic Violence Cases: From Recantation to Refusal to Testify*, 8 COLUM. J. GENDER & L. 67, 68 n.4 (1998); Sue Osthoff & Holly Maguigan, *Explaining Without Pathologizing: Testimony on Battering and Its Effects*, *in* CURRENT CONTROVERSIES ON FAMILY VIOLENCE 225 (Donileen R. Loseke et al. eds., 2005).

No, she's not normal. Normal people don't go out and hire somebody to kill their husband." Tr. 1941.

The Sixth Circuit majority opinion acknowledges the "longstanding, commonsense belief in our culture that people who kill their spouses because of infidelity are not as culpable as other murderers." Pet. App. 36. It inexorably follows that the suppressed evidence was "material," because its disclosure could readily have affected Ms. Owens' sentence, as one or more juror could well have voted for a life sentence. TENN. CODE ANN. § 39-2-203(h) (1982) (one juror's vote for life results in a life sentence). But the prejudice to Ms. Owens from the state's failure to disclose was far more egregious when the suppression is examined in the context of the battering to which she was subjected.

A. THE PRE-TRIAL RECORD REFLECTS THAT GAILE OWENS WAS THE VICTIM OF DOMESTIC VIOLENCE.

The record reflects evidence of battering and its effects on Ms. Owens: (1) before her arrest, Ms. Owens, when being recorded without her knowledge, said that she had hired someone to kill her husband because of "bad marital problems" (Pet. App. 3); (2) at the time of arrest, Ms. Owens reported "bad marital problems" with her husband "over the years, and I just felt like he had been cruel to me," although "[t]here was very little physical violence" (Pet. App. 4);[3] (3) Ms. Owens' counsel

3. Ms. Owens' statement that "there was very little physical violence," upon which the Sixth Circuit majority seized to

(Cont'd)

sought the appointment of an independent mental health expert "familiar with the characteristics" of the "battered-wife syndrome," because "[we] believe and honestly state to the court that we believe this case has a meritorious defense in the battered-wife syndrome." CA6 J.A. 116, 120. At that same hearing, counsel stated that they were prepared to present Ms. Owens' testimony, explaining that they had recently learned that "the deceased engaged in certain sexual perversions, to wit, sodomy, fellatio, to the point where she was required to throw up, to the point where . . . her rectum was torn[.]" CA6 J.A. 125, 128.[4]

(Cont'd)

discount the abuse inflicted upon her, is extremely important in the context of the domestic-violence case. As is discussed *infra*, experts report that "battered women are very reluctant to tell anyone that their husbands beat them[]" *Ibn-Tamas v. United States*, 407 A.2d 626, 634 (D.C. 1979), sexual abuse and rape of one's wife is often not regarded as physical violence, even by the victim, see note 8, and emotional and psychological abuse is often the most persistent, and perceived as the most damaging, aspect of domestic violence, see discussion *infra* at pp. 7-9.

4. The responses of the prosecutor and the trial court are significant in the context of the domestic-violence case, as the court asked if there was medical proof and whether Ms. Owens had sought medical services (CA6 J.A. 125), and the prosecutor opposed the appointment of a defense expert because "there is not one scintilla of evidence before this court to show or indicate the need for this type of examination." CA6 J.A. 123. As is too often the case, testimony or evidence from a battered woman about the battering and its effects was discounted as not credible. *See, e.g.*, *Ibn-Tamas*, 407 A.2d at 632-35.

During competency evaluations by the state's mental-health experts, Ms. Owens repeated that she suffered from an "unhappy marital situation in which her husband abused her verbally, had affairs, and humiliated her sexually," Pet. App. 21; CA6 J.A. 283, and told another state's expert, whose handwritten notes were reproduced as well as possible in the Sixth Circuit's majority opinion:

> . . . Never sure Ron loved me . . . [I] [n]eeded to feel loved – [w]ouldn't be married unless love. [Ron was?] only affect[tionate?] in bed. He didn't think affect[tion] import[ant] but it was to me. Last 4-5 yrs. Affairs. Didn't [illegible] he didn't deny. None of my business. I run house. It built up in me. I felt like explode. Ask for Di[vorce]. He told me I never get kids. Beg him for compliments. Couldn't cope[,] gained weight. Ask[ed] for him to tell me I look nice. He say you don't sweat much for a fat person. Begged him to tell me what I do wrong and I change. Waited on him. [Told?] . . . No ackn[owledgment?] . . . Couldn't cope anymore . . . .[5]

CA6 J.A. 275; Pet. App. 21-22.

---

5. Research on forms of emotional and psychological abuse perpetrated by abusers has identified efforts to convince abused women that they are "lazy, incompetent, stupid, oversexed, sexually frigid, bad parents, poor wives – in a word, worthless." MICHAEL P. JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE 15 (2008) (hereinafter TYPOLOGY OF DOMESTIC VIOLENCE).

With this evidence, it is no surprise that defense counsel advised the trial court that Ms. Owens "had a meritorious defense in the battered-wife syndrome." CA6 J.A. 120. But the record reveals that, at a pre-trial hearing and in the presence of Ms. Owens, when defense counsel suggested that there was evidence of abuse, the court asked for "medical proof" and whether she had sought "medical services," to which trial counsel responded that she only had "her proof." CA6 J.A. 125; Pet. App. 53-54.

It cannot be gainsaid that Ms. Owens communicated to the police, the state's mental health experts, and to her counsel that she had suffered abuse – physical, verbal, psychological and sexual – by her husband. Nor can it be disputed that there was not one word about abuse at Ms. Owens' trial or her sentencing. The issue, then, is the significance of the suppressed evidence in the context of Ms. Owens' life as a victim of domestic violence and the ultimate question is whether there is a "reasonable probability that there would have been a different result had the evidence been disclosed." *Owens v. Guida*, 549 F.3d 399, 415 (6th Cir. 2008) (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

B. BATTERING, ITS EFFECTS, AND THE MATERIALITY OF THE SUPPRESSED EVIDENCE OF INFIDELITY.

Battering and its effects have been the subject of extensive research and study over the past 35 years. The subject was already in the forefront of sociological, psychological, and jurisprudential study at the time of Ms. Owens' trial. Indeed, one year earlier, the New

Jersey Supreme Court recognized that the "battered woman's syndrome" had been discussed at symposia since 1977, and that numerous books, articles and papers "indicate the presence of a growing field of study and research about the battered woman's syndrome and recognition of the syndrome in the scientific field." *State v. Kelly*, 478 A.2d 364, 380 (N.J. 1984). The New Jersey court, in holding that the battered-woman's syndrome was an appropriate subject for expert testimony to support self-defense in a homicide case, described "a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives." *Id.* at 371.

The *amicus curiae* brief submitted in *Kelly* by the American Psychological Association noted that the "overwhelming majority of courts confronted with the question of the admissibility of expert testimony of the battered woman syndrome have accepted such testimony," that there was a substantial amount of literature and law review commentary on the subject, and that a significant number of respected researchers had devoted themselves to the field. Brief of Amicus Curiae American Psychological Association in Support of Defendant-Petitioner, reprinted in *State v. Kelly: Amicus Briefs*, 9 WOMEN'S RTS. L. REP. 245, 254, 256 (1986) (hereinafter *Amicus Briefs*). Indeed, the District of Columbia Court of Appeals, five years earlier, had observed that the subject of "battered wives" had "received considerable study." *Ibn-Tamas*, 407 A.2d at 638 n.24.

An *amici curiae* brief, submitted in *Kelly* by the American Civil Liberties Union of New Jersey and the New Jersey Coalition for Battered Women, noted that "[p]rofound psychological abuse also accompanies the physical abuse" and that "it has been widely accepted that battered women share common characteristics of feeling shame for their situation and attempting to hide their battering from others." Brief and Appendix of Amici Curiae American Civil Liberties Union of New Jersey and the New Jersey Coalition of Battered Women, reprinted in *Amicus Briefs*, *supra*, at 247, 249.[6] Particularly significant to Ms. Owens' case is a study drawn from data collected during the late 1970s, which elucidates the malevolent effects of the psychological abuse that often accompanies domestic violence:

> At the interpersonal level, psychological abuse accompanying violence often invokes feelings of guilt and shame in the battered victim. Men define violence as a response to their wives' inadequacies or provocations, which leads battered women to feel that they have failed. Such character assaults are

---

6. The courts have come to recognize "battered woman syndrome" as a "set of psychological and behavioral reactions exhibited by victims of severe, long-term, domestic physical and emotional abuse." *United States v. Johnson*, 956 F.2d 894, 899 (9th Cir. 1992). This domestic violence erupts in "a continuing pattern of behavior that includes physical and non-physical manifestations of power and control." Judith E. Koons, *Gunsmoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly Legal Doctrines*, 14 J.L. & Pol'y 617, 653-54 (2006) (hereinafter *Gunsmoke and Legal Mirrors*) (footnote omitted).

> devastating, and create long-lasting feelings of inferiority . . . Psychologists working with battered women consistently report that self-confidence wanes over years of ridicule and criticism.

Kathleen J. Ferraro & John M. Johnson, *How Women Experience Battering: The Process of Victimization*, 30 SOC. PROBS. 325, 334 (1983) (hereinafter *How Women Experience Battering*).

Before Ms. Owens' trial, her counsel requested from the prosecutor all evidence that Mr. Owens "had numerous girlfriends, extra-marital sexual affairs involving unusual sexual proclivities and/or perversions," because "these proclivities, perversions and affairs were flaunted and visited upon defendant with such regularity and in such ways as to contribute to [her] state of mind and mental condition." Pet. App. 56; CA6 J.A. 101. The suppressed letters and police report establish Mr. Owens' sexual philandering, which – when considered in the larger context of domestic abuse – are obvious exemplars of the psychological violence that he perpetrated. In fact. Drs. Mary Ann Dutton and Lisa Goodman, in their exploration of coercion's role in domestic violence, explain that an abuser will typically make demands on the abused, and will subsequently follow up on the demands with a "credible threat to induce compliance." Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1118 & n.41 (2009) (citing Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Towards a New Conceptualization*, 52 SEX

ROLES 743, 743-44 (2005)). One of the "credible threats" that the authors identified is "having sex with another person." *Id.* at 1118.

Although the "law often focuses on discrete incidents of physical violence – the 'number of hits' – not the 'continuum of sexual and verbal abuse, threats, economic coercion, stalking, and social isolation' that is the experiential nature of domestic violence[,]" it is well known that "[p]hysical violence is simply one aspect of the injury suffered." *Gunsmoke and Legal Mirrors*, *supra*, at 653-54. Indeed, for some battered women, it is "the non-physical abuse, including humiliation and psychological degradation, [that is] particularly painful" *id.* at 654, and thus, battered women have been reporting for decades "that the violence is not all of it, or in some cases not even the worst of it." TYPOLOGY OF DOMESTIC VIOLENCE, *supra*, at 13 (footnote omitted).[7]

The suppressed evidence is thus significant as one segment of this couple's domestic-violence web. But it is its role as independent corroboration of Ms. Owens' painful admissions that is most significant in the context of battering and its effects, and that underscores the materiality of this "favorable" evidence.

---

7. A study by Sackett & Saunders in 1999 found that, while psychological and physical abuse had fairly independent effects on depression and self-esteem, psychological abuse had a much stronger impact on the battering victim's fear than did physical abuse. "Ridiculing traits, criticizing behavior, and jealous/control had the strongest relationship to fear." Leslie A. Sackett & Daniel G. Saunders, *The Impact of Different Forms of Psychological Abuse on Battered Women*, 14 VIOLENCE AND VICTIMS 1, 10 (1999).

C. BATTERING AND ITS EFFECTS: THE RATIONALIZATION AND DENIAL OF VIOLENCE AND THE VITAL ROLE OF INDEPENDENT CORROBORATION.

All too often, the victims of domestic abuse rationalize the violence inflicted upon them through various types of denial. *How Women Experience Battering*, *supra*. Ferraro and Johnson describe neutralization techniques including the "denial of injury," in which battered women may engage because "the experience of being battered by a spouse is so discordant with their expectations that they simply refuse to acknowledge it." *Id.* at 329. While the "denial of injury does not mean that women feel no pain," the hurt is defined as "tolerable" or "normal," with the result that these "battered women tolerate a wide range of physical abuse before defining it as an injurious assault." *Id.*[8] And Richard Gelles, drawing on studies of marital violence conducted in 1967, 1974 and 1976, concluded that "many victims of family violence . . . do not view these acts as violence. . . ." Richard J. Gelles, *Power*,

---

8. In her poignant 1984 study, M. D. Pagelow "noted that, although a few women were choked to the point of unconsciousness during sexual intercourse, they did not define themselves as having been the victims of sexual violence." Angela Browne, *The Victim's Experience: Pathways to Disclosure*, 28 PSYCHOTHERAPY 150, 151 (1991) (citing Pagelow) (hereinafter *The Victim's Experience*). And the concept that a husband could rape his wife was not codified in most of our nation's criminal statutes until the 1990s. RAQUEL KENNEDY BERGEN, WIFE RAPE: UNDERSTANDING THE RESPONSE OF SURVIVORS AND SERVICE PROVIDERS 150 (1996) ("On July 5, 1993, wife rape became a crime in all 50 states").

Sex, and Violence: The Case of Marital Rape, 26 THE FAMILY COORDINATOR 339, 340 (1977).[9]

Battered women may engage in the "denial of victimization" because they "blame themselves for the violence, thereby neutralizing the responsibility of the spouse." *How Women Experience Battering*, *supra*, at 329. As Browne explicated, "[f]or most individuals, the experience of victimization also generates negative self-perceptions," and the "[a]nticipation of the negative reactions of others and the potential for further humiliation makes the decision to disclose even more difficult." *The Victim's Experience*, *supra*, at 152 (citations omitted).[10]

---

9. Angela Browne, of the University of Massachusetts Medical Center Department of Psychiatry, reported:

> In some home environments, abusive behavior has been so constant a factor that individuals simply define its occurrence as normative and, unless a contrast is presented, do not consider themselves to be victims in any unusual sense.

The Victim's Experience, *supra*, at 150. Years prior to trial, Ms. Owens did admit her harsh childhood to a psychiatrist, Pet. App. 32, and years later, conceded the physical, emotional and sexual abuse to which she was subjected in her family of origin. Pet. App. 19-20. Although this was largely disputed by her family, even her sister, who was a star state witness, did allow that their father was "too aggressive with discipline[]." Pet. App. 20.

10. Indeed, although the record establishes that Ms. Owens did inform her counsel of the abuse visited upon her, one of her attorneys, in an unsuccessful attempt to secure an independent mental-health expert on battering, noted Ms. Owens' reticence to admit the battering to them: "Neither one of us suspected this in our first several visits with her. It's only been within the last week that we found out about all of this perversion and all this other stuff. We got it from her." CA6 J.A. 132.

It is particularly true where sexual abuse predominates that, "women are reluctant to seek help out of fear that they will be blamed for the situation or simply not believed . . . and work hard to keep the secret." Rita Weingourt, *Wife Rape: Barriers to Identification and Treatment*, XXXIX AM. J. PSYCHOTHERAPY 187, 192 (1985) (hereinafter *Wife Rape*). And more women are "willing to disclose violence in other areas of the marriage than to disclose violence of force in sexual relations . . . [for] honest disclosure of marital sexual abuse is more difficult than disclosure of any other form of abuse." *Id.* at 187.[11]

Against this backdrop, both Ms. Owens' attempt to minimize the violence that her husband had perpetrated upon her under interrogation by the police and her subsequent disinclination to testify before the jury may readily be understood. But most important to the *Brady*[12] issue is the significance of *independent* corroboration, which is important for any criminal defendant – but particularly so for the victim of a battering relationship, for whom the shame and guilt, the fear of not being believed, and the real likelihood that, absent corroboration and expert testimony, she will not be believed, are all too often her bitter reality. *See Ibn-Tamas*, 407 A.2d at 632-35 (expert testimony on battering may be admissible to support credibility of battering victim, because the subject matter may be

---

11. But it "is a myth that wife rape is less traumatic than any other rape" for "data that are beginning to emerge demonstrate that the most upsetting and long-term ill-effects result from rape by a husband or relative." *Wife Rape*, *supra*, at 188 (footnotes omitted).

12. *Brady v. Maryland*, 373 U.S. 83 (1963).

beyond the ken of the average layperson). And Congress, in enacting the Violence Against Women Act, explicitly "recognized that lay understandings of domestic violence are frequently comprised of 'myths, misconceptions, and victim blaming attitudes.'" *Hernandez v. Ashcroft*, 345 F.3d 824, 836 (9th Cir. 2003) (citation omitted).

It is an unfortunate truism that "a prosecutor or trier of fact may not believe a battered woman's account of her relationship with a spouse or companion because of misconceptions about domestic violence and an abused woman's ability to leave the battering relationship." *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV 1498, 1580-81 (1993). Studies have suggested that jurors likewise labor under these same misconceptions, and the majority of courts have accordingly permitted expert testimony on battering and its effects. *See generally* Charles Patrick Ewing & Moss Aubrey, *Battered Woman and Public Opinion: Some Realities about the Myths*, 2 J. FAM. VIOLENCE 257 (1987).

The record in this case is rife with such evidence of misconceptions about battering and its effects. Before trial, the suggestion by Ms. Owens' attorneys that she might be able to present a "battered wife" defense was met with the prosecutor's retort:

> There is no proof. No witness has been brought in here to say, ["]Oh, I knew Mrs. Owens and, yeah, this guy used to batter her,["] or ["]she told me about it and I saw her injuries.["]

> There's no proof before the court, so there is no basis whatsoever for this motion.

CA6 J.A. 123.[13] Later in that same hearing, when defense counsel proffered that Ms. Owens had suffered physical abuse, the court asked if counsel had "medical proof" and whether she sought "medical services," CA6 J.A. 125. Counsel responded, "We have her proof." *Id.*[14]

This hearing not only confirms that Ms. Owens' battering experience would likely not have been believed absent independent corroboration, but also could only have served to confirm for Ms. Owens, her own belief as a battered woman that she would not be believed absent such corroboration. The significance of the independent corroboration offered by the suppressed evidence is patent. *See DePetris v. Kuykendall*, 239 F.3d 1057, 1063-64 (9th Cir. 2001) (in homicide of battering husband, exclusion of husband's diary corroborating past violence, albeit not against wife,

---

13. It is beyond dispute that "most instances of domestic violence go unreported and undetected." Liane V. Davis, *Beliefs of Service Providers about Abused Women and Abusing Men*, SOC. WORK, May-June 1984, at 243, 248.

14. The Sixth Circuit majority cites this colloquy between the court and counsel, italicizing "*her* proof," meaning *only* "her proof," as "fully consistent with her contemporaneous statement to the police that 'there was very little violence.'" Pet. App. 53-54. This supposition is significant in that, in addition to the trial court's request for independent corroboration of Ms. Owens' battering claim, the majority likewise suggests that her claim is refuted because it was only supported by her account, an account that the majority questions because Ms. Owens reported "very little violence" to the police.

was error since it "was not subject to attack on the grounds of bias or self-interest . . . [and] was the only unbiased source of corroboration [of wife's battering claim.]"[15]

The majority opinion is a startling example of allegiance to the misconceptions that still confront a battered woman today, and perhaps best elucidates the often ineluctable consequences of being bereft of independent corroboration. First, the majority seizes upon Ms. Owens' initial arrest statement describing "a bad marriage over the years, and I just felt like he had been cruel to me. There was very little physical violence," Pet. App. 4, as undermining her battering defense. Pet. App. 23, 54. Thus, the majority discounts her later admissions of battering, without any acknowledgment of the ample research on battering and its effects that underscores the resultant

---

15. Indeed, focusing again on the pre-trial proceedings in this case, the record suggests that Ms. Owens' own counsel called into question her credibility absent independent corroboration. For counsel – even when armed with her statements of her husband's infidelity and abuse that triggered the filing of the *Brady* motion indicating "a good reason to believe that the deceased husband . . . had numerous girlfriends . . . which he flaunted" and thus requesting correspondence to and from "lovers" (CA6 J.A. 101) – when advised by the prosecutor that there was no such evidence, responded, "I certainly accept that [representation]. I've got no reason not to." CA6 J.A. 115A.

On the materiality question – whether there is a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different – this exchange underscores what this Court has long recognized, that, "[i]n reliance on this misleading representation [of no such evidence], the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise might have pursued." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

shame and denial, see *supra*, at pp. 8-12, and that explains that "[d]isclosure is almost always an ongoing process." *The Victim's Experience*, *supra*, at 153; Marsha E. Wolf et al., *Barriers to Seeking Police Help for Intimate Partner Violence*, 18 J. FAM. VIOLENCE 121, 123 (2003) ("In discussing the types of abuse for which they would seek police assistance, women felt that they needed to have "physical evidence" to prove that abuse had occurred. Emotional abuse, on the other hand, was viewed as a much grayer area . . .").

The majority next subscribes to the misconception that, if a woman is truly battered, there will be independent corroborative evidence, and that a woman's reports of violence – standing alone – are incredible. The majority accordingly discounts a post-conviction mental-health expert's testimony about horrific abuse[16] to the extent that the testimony was based on Ms. Owens' statements, noting that she "certainly has a motive to be less than truthful" and that "it is hearsay from statements that Owens made *after* the murder and thus it lacks credibility." Pet. App. 19, 23 (emphasis by the court). Similarly, the majority rebuffs the dissent's discussion of "defense knowledge of evidence of savage abuse," because "that evidence rests wholly on what are said to be Ms. Owens'[] statements at a pretrial time." Pet. App. 53.[17]

---

16. Graphic details of the abuse inflicted upon Ms. Owens are set forth in the dissent. Pet. App. 65-67.

17. Even when independent medical evidence is presented that corroborates Ms. Owens' battering horrors, the majority is disinclined to believe Ms. Owens. Her admission that on the night before the birth of her second son, her husband forced

(Cont'd)

With the majority opinion thus rooted in common misconceptions of the battering experience and its effects, it is an appalling irony that the decision, when turning to the suppressed evidence, finds that, while this suppressed evidence – the independent corroboration of her husband's infidelity – was favorable, it was not material because Ms. Owens "knew or should have known the essential facts permitting h[er] to take advantage of any exculpatory evidence." Pet. App. 39. The majority, at once utterly discounting Ms. Owens' credibility on her battering claim, nonetheless reaches the completely contradictory holding, one that is necessarily dependent on Ms. Owens' credibility: that she could have testified to the affairs because she knew of them.[18]

(Cont'd)

her to engage in such brutal sexual intercourse that her placenta partially detached, requiring an emergency C-section to save her life and that of her son, Pet. App. 66 (Merritt, J., dissenting), is conjoined with but not confirmed by another "minor piece[] of evidence:"

> Hospital records show that after the birth of one of her children, Owens suffered vaginal bleeding secondary to a fifteen percent partial abruptio placenta. This is at least consistent with her allegation, made secondhand ... that her husband sexually abused her the night before.

Pet. App. 23-24. The majority proceeds to discount this corroboration: "But it does not prove her claim because the injury could have happened many other ways. No medical testimony established even speculative causation." Pet. App. 24.

18. The majority opinion also suggests that Ms. Owens might have called her husband's paramour, because the paramour might

(Cont'd)

The persuasiveness of independent corroboration of any criminal defendant's defense is a given, recognized by *Brady* and its progeny. But the significance of corroboration is highlighted in the context of the experiences of battered women, and underscored by all of the trial and post-trial judicial processes in Gaile Owens' case.

CONCLUSION

The suppressed evidence of Ron Owens' affair "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the [sentencing] verdict." *Cone v. Bell*, __ U.S. __, 129 S. Ct. 1769, 1783 (2009) (quoting *Kyles*, 514 U.S. at 435). One or more jurors, armed with the whole truth, could readily have concluded that this was not a case of a killing of an innocent man for insurance proceeds, but rather was a desperate act that sadly culminated years of abuse. The court below grossly misapplied this Court's precedent in justifying the petitioner's capital sentence, when the jury never heard the full, tragic story before determining whether a death sentence was warranted.

(Cont'd)

have admitted the affair since she admitted it to the police. Pet. App. 38. The majority thus overlooks that the paramour's admission was made when the police were armed with her sexually-explicit love letters – the suppressed evidence that this paramour later sought and the police returned – and that her admission to the police was unknown to the defense because it was secreted in the other suppressed evidence – the police report. Pet. App. 38.

Respectfully submitted,

KAREN M. GOTTLIEB
Counsel of Record
Post Office Box 1388
Coconut Grove, FL 33233-1388
Telephone: (305) 648-3172
Facsimile: (305) 648-0465

ELLIOT H. SCHERKER
JULISSA RODRIGUEZ
KERRI L. MCNULTY
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, FL 33131
Telephone: (305) 579-0500
Facsimile: (305) 579-0717

PETER R. GOLDBERGER
50 Rittenhouse Place
Ardmore, PA 19003
Telephone: (610) 649-8200
Facsimile: (610) 649-8362

Attorneys for Amicus Curiae